

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OSCAR POTTS,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. CV 10-2781-JEM

MEMORANDUM OPINION AND ORDER
REVERSING DECISION OF THE
COMMISSIONER OF SOCIAL SECURITY
AND REMANDING FOR FURTHER
PROCEEDINGS

PROCEEDINGS

On April 19, 2010, Oscar Potts ("Plaintiff" or "Claimant" or "Potts") filed a complaint seeking review of the decision of the Commissioner of Social Security ("Commissioner") denying Plaintiff's application for Supplemental Security Income ("SSI") benefits. The Commissioner filed an Answer on November 3, 2010. The parties filed a Joint Stipulation ("JS") on March 8, 2011. The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record ("AR"), the Court concludes that the Commissioner's decision should be reversed and remanded for further proceedings in accordance with law and with this Memorandum and Opinion.

BACKGROUND

Plaintiff is a 52 year old male who alleged disability beginning May 15, 1991, due to back problems (AR 13) and mental difficulties. (AR 128.) Plaintiff's claim was denied initially on December 27, 2005, and on reconsideration on May 3, 2006. (AR 13.) He filed a timely request for hearing, which was held before Administrative Law Judge ("ALJ") Jeffrey Hatfield on May 22, 2008, in Long Beach, California. (AR 13-19.) Claimant appeared and testified. (AR 13.) Vocational expert ("VE") Aida Y. Worthington also testified. (AR 13.) Claimant was not represented by counsel. (AR 13.)

The ALJ issued an unfavorable decision on June 5, 2008. (AR 13-19.) The Appeals Council denied review on March 15, 2010. (AR 1-4.)

DISPUTED ISSUES

As reflected in the Joint Stipulation, the only disputed issue that Plaintiff is raising as a ground for reversal and remand is as follows:

1. Whether the ALJ erred in failing to obtain a sufficient waiver from Oscar Potts of his right to counsel.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

Substantial evidence means "'more than a mere scintilla'. . . but less than a preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S. at 401 (internal quotations and citation omitted).

This Court must review the record as a whole and consider adverse as well as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

1 Where evidence is susceptible to more than one rational interpretation, the ALJ's decision
 2 must be upheld. Morgan v. Comm'r, 169 F.3d 595, 599 (9th Cir. 1999). "However, a
 3 reviewing court must consider the entire record as a whole and may not affirm simply by
 4 isolating a 'specific quantum of supporting evidence.'" Robbins, 466 F.3d at 882 (quoting
 5 Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d
 6 625, 630 (9th Cir. 2007).

7 **SEQUENTIAL EVALUATION**

8 The Social Security Act defines disability as the "inability to engage in any substantial
 9 gainful activity by reason of any medically determinable physical or mental impairment which
 10 can be expected to result in death or . . . can be expected to last for a continuous period of
 11 not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner
 12 has established a five-step sequential process to determine whether a claimant is disabled.
 13 20 C.F.R. §§ 404.1520, 416.920.

14 The first step is to determine whether the claimant is presently engaging in substantial
 15 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is
 16 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,
 17 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a
 18 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is
 19 not severe if it does not significantly limit the claimant's ability to work. Smolen v. Chater, 80
 20 F.3d 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is
 21 listed, or equivalent to an impairment listed, in Appendix I of the regulations. Id. If the
 22 impediment meets or equals one of the listed impairments, the claimant is presumptively
 23 disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine whether the
 24 impairment prevents the claimant from doing past relevant work. Pinto v. Massanari, 249
 25 F.3d 840, 844-45 (9th Cir. 2001). Before making the step four determination, the ALJ first
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1 must determine the claimant's residual functional capacity ("RFC").¹ 20 C.F.R. § 416.920(e).
 2 The RFC must consider all of the claimant's impairments, including those that are not
 3 severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the
 4 claimant cannot perform his or her past relevant work or has no past relevant work, the ALJ
 5 proceeds to the fifth step and must determine whether the impairment prevents the claimant
 6 from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th
 7 Cir. 2000).

8 The claimant bears the burden of proving steps one through four, consistent with the
 9 general rule that at all times the burden is on the claimant to establish his or her entitlement
 10 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
 11 claimant, the burden shifts to the Commissioner to show that the claimant may perform other
 12 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a
 13 finding that a claimant is not disabled at step five, the Commissioner must provide evidence
 14 demonstrating that other work exists in significant numbers in the national economy that the
 15 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
 16 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled
 17 and entitled to benefits. Id.

18 THE ALJ DECISION

19 In this case, the ALJ determined at step one of the sequential evaluation that Plaintiff
 20 has not engaged in substantial gainful activity since May 25, 2005, the application date. (AR
 21 15.)

22 At step two, the ALJ determined that Plaintiff has the severe medical impairment of
 23 multilevel disc disease of the lumber spine. (AR 15.)

24 At step three, the ALJ found that Plaintiff does not have an impairment or combination
 25 of impairments that meets or medically equals one of the listed impairments. (AR 15.)

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 27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her]
 28 limitations" and represents an assessment "based on all the relevant evidence." 20 C.F.R.
 §§ 404.1545(a)(1), 416.945(a)(1).

1 The ALJ found that Claimant had “the residual functional capacity to lift and carry 50
2 pounds occasionally and 25 pounds frequently, stand/walk 6 hours in an 8 hour workday, no
3 ladder/rope/scaffold climbing, and avoidance of working around hazardous machinery, at
4 unprotected heights or driving as an occupational requirement.” (AR 15.) In assessing
5 Claimant’s RFC, the ALJ determined that there was no evidence of any medically
6 determinable mental impairment and also made an adverse credibility finding (AR 17), but
7 this finding related only to Potts’ back pain allegations which are not in issue on this appeal.

8 At step four, the ALJ found that the Claimant has no past relevant work. (AR 17.)

9 At step five, with the aid of vocational expert testimony, the ALJ determined that there
10 were jobs that exist in significant numbers in the national economy that Claimant can
11 perform. (AR 18.)

12 Hence, the ALJ concluded that Plaintiff was not disabled within the meaning of the
13 Social Security Act. (AR 18.)

14 DISCUSSION

15 The ALJ decision must be reversed. The lay witness evidence of Plaintiff’s
16 comprehension difficulties triggered the ALJ’s duty to develop the record further.
17 Notwithstanding this evidence, the ALJ failed to conduct a sufficient inquiry to determine if
18 Plaintiff’s waiver of counsel was knowing and voluntary. The lack of counsel resulted in
19 prejudice and unfairness in the administrative process. The ALJ committed error by not
20 developing the record further and by not discussing the lay witness evidence. That evidence
21 undermines the ALJ’s RFC and the ALJ’s step five conclusion that Potts could perform jobs
22 in the national economy. The ALJ decision must be reversed and remanded to obtain a
23 consulting examiner’s assessment of Plaintiff’s mental capacity.

24 A. Factual And Procedural Background

25 A Social Security claimant has a statutory right to be represented by counsel at an
26 administrative hearing. 42 U.S.C. § 406; Saelee v. Astrue, 2011 WL 794922, *2 (E.D. Cal.
27 2011); Duns v. Heckler, 586 F. Supp. 359, 364 (N. D. Cal. 1984). At the administrative
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1 hearing here, the ALJ obtained a signed waiver of counsel from Potts. (AR 26-27, 75.)
2 Plaintiff, however, asserts that the ALJ did not obtain a sufficient, knowing waiver of his right
3 to counsel, and seeks reversal and remand on that basis.

4 In response to the Written Questions To Claimant form dated May 19, 2008, Potts
5 alleged diminished mental capacity. (AR 128.) He stated he “forgets easily,” is not able “to
6 understand or remember complex instructions,” is “confused at times,” and needs “more
7 direction or information to finish task,” and is “distracted easily, has to be redirected.” (AR
8 128.)

9 A Social Security interviewer by the name of A. Jackson confirmed Plaintiff’s
10 allegation. In a June 10, 2005, Disability Report (AR 79-82), the interviewer indicated Potts
11 has difficulty with understanding, coherency, concentrating, and answering. (AR 80-81.)
12 Potts rambled and “drifted off on topics I didn’t ask him about several times.” (AR 81.) He
13 started talking to himself and the interviewer “had to rephrase several questions in order for
14 him to grasp what was being said.” (AR 81.)

15 Potts’ niece Brenda Fay gave similar testimony at the hearing. (AR 39-41.) She
16 stated that “he don’t comprehend too well” (AR 27) and “he don’t comprehend so when you
17 ask him questions, you have to continue to ask him.” (AR 29.) She also stated that Potts
18 “does not comprehend very well” and “there’s a lot of stuff you have to keep repeating.” (AR
19 39.) Ms Fay had the following colloquy with the ALJ:

20 A. Well, when you kept saying prepare, do you prepare your own
21 sandwich or something like that, I don’t think he understood what
22 prepare means. And you said fix - -

23 Q. Well - -

24 A. So I don’t know if he, you know what I’m saying, certain words he
25 may not understand - -

26 Q. All right. Okay.

27 A. - - until you break it down to his, you know - -
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1 Q. All right.

2 A. - - - level of thinking.

3 Q. All right.

4 ALJ: We're going to go to the vocational expert. All right.

5 (AR 40-41.)

6 Despite these allegations and facts, the ALJ dismissed Plaintiff's mental difficulties
7 and assessed no RFC mental limitations:

8 The Claimant alleges mental problems (Exhibit I0E), but the record
9 does not show subjective mental complaints, abnormal psychiatric signs
10 or symptoms, psychiatric diagnosis or psychiatric work-up or treatment.

11 The undersigned finds no evidence of a medically determinable mental
12 impairment.

13 (AR 17.)

14 **B. Applicable Federal Law**

15 In Social Security cases, the ALJ has a special, independent duty to develop the
16 record fully and fairly and to assure that the claimant's interests are considered. Tonapetyan
17 v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001); Smolen, 80 F.3d 1273, 1288 (9th Cir. 1996);
18 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ has a basic duty to inform
19 himself about facts relevant to his decision. Heckler v. Campbell, 461 U.S. 458, 471 n.1
20 (1983) (Brennan, Jr., concurring). When the claimant is unrepresented, the ALJ must be
21 "especially diligent" in exploring for all relevant facts. Tonapetyan, 242 F.3d at 1150. The
22 ALJ's duty to develop the record fully is also "heightened" when the claimant may be
23 mentally ill and unable to protect his or her interests. Id. Ambiguous evidence or the ALJ's
24 own finding that the record is inadequate to allow for proper evaluation of the evidence
25 triggers the ALJ's duty to "conduct an appropriate inquiry." Id.

26 Plaintiff can knowingly and intelligently waive his statutory right to counsel. Duns, 586
27 F. Supp. at 364; Perez v. Astrue, 2009 WL 3170041, *3 (C.D. Cal. 2009). Even if the waiver
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1 is deficient, plaintiff must demonstrate prejudice or unfairness in the proceedings to obtain a
 2 remand. Hall v. Sec'y of Health, Educ. & Welfare, 602 F.2d 1372, 1378 (9th Cir. 1979). The
 3 real issue, however, is not whether the waiver was knowing or intelligent, but whether,
 4 without the representation, the ALJ met his heightened duty "to consciously and scrupulously
 5 probe into, inquire of, an explore for all relevant facts" to protect plaintiff's interests. Cox v.
 6 Califano, 587 F.2d 988, 991 (9th Cir. 1978); see also Vidal v. Harris, 637 F.2d 710, 713 (9th
 7 Cir. 1981); Key v. Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). This duty includes diligently
 8 ensuring that both favorable and unfavorable facts and circumstances are elicited at the
 9 administrative hearing. Cox, 587 F.2d at 991; Vidal, 637 F.2d at 713; Key, 754 F.2d at 1551.
 10 Only if plaintiff can demonstrate prejudice or unfairness in the administrative proceeding, as
 11 a result of not having counsel present, is remand warranted. Vidal, 637 F.2d at 713.

12 **C. The ALJ Failed To Develop The Record Properly Which**
 13 **Resulted In Prejudice And Unfairness In The Hearing**

14 The ALJ was presented with substantial un rebutted evidence from Claimant, his niece
 15 and a Social Security interviewer that Plaintiff had potential mental limitations that obliged the
 16 ALJ to conduct an appropriate inquiry into Potts' waiver of his right to counsel. Claimant's
 17 niece repeatedly told the ALJ at the hearing that Potts did not comprehend too well. The
 18 ALJ, however, only asked Claimant if he was prepared to proceed without a lawyer (AR 26)
 19 and then gave two long orations about the proceedings, which the Court doubts Claimant
 20 understood. (AR 27-28, 29-30.) The orations had nothing to do with representation or
 21 Claimant's ability to waive it knowingly. There was never any meaningful inquiry of Claimant
 22 to determine whether he understood what he was waiving. In the absence of an appropriate
 23 inquiry, there is no way to know whether Potts' waiver of his right to counsel was knowing
 24 and intelligent. The Court concludes that Potts was motivated principally by a desire to
 25 proceed to get benefits, without any true understanding of the consequences of proceeding
 26 without counsel.

27 Even if the waiver was deficient, Plaintiff must demonstrate that the lack of counsel
 28 resulted in prejudice and unfairness in the administrative process and hearing. Vidal, 637

1 F.2d at 713. The ALJ made numerous errors that establish prejudice and unfairness and
2 require remand.

3 First, the ALJ failed to develop the record fully and fairly as Tonapetyan commands.
4 Tonapetyan, 242 F.3d at 1150. The lay witness evidence triggered the ALJ's heightened
5 duty to develop the facts to protect Plaintiff's interests, in view of his lack of representation
6 and possible mental limitations. The ALJ decision asserts that "the record does not show
7 subjective mental complaints." (AR 17.) This finding is not supported by substantial
8 evidence. The ALJ had before him the substantial un rebutted evidence of Pott's mental
9 limitations from Claimant, his niece and the Social Security interviewer. The ALJ never
10 mentions this evidence or attempts to discount it in his decision. The evidence of
11 comprehension difficulties from Claimant, his niece and the Social Security interviewer was
12 enough to trigger the ALJ's duty to develop the record further on Potts' mental limitations.
13 On this record, the ALJ should have ordered a mental assessment before proceeding further
14 or kept the hearing open to accept such evidence. The Appeals Council should have
15 ordered a mental assessment. These are the kind of efforts contemplated by case authority
16 requiring the ALJ to be "especially diligent in exploring for all the relevant facts" as to
17 unrepresented claimants. Tonapetyan, 242 F.3d at 1150.

18 Second, the ALJ's failure to develop the record resulted in a prejudicial finding of no
19 mental impairment. The ALJ decision asserts that there is no record of "abnormal psychiatric
20 sign or symptoms, psychiatric diagnosis or psychiatric work-up or treatment." (AR 17.) As a
21 result, the ALJ found "no evidence of a medically determinable mental impairment." (AR 17.)
22 Although the ALJ is correct that the record contains no medical evidence of mental
23 impairment, the reason is that the ALJ failed to develop the record by ordering a mental
24 assessment. The ALJ's determination of no mental impairment must be set aside as it is the
25 product of the ALJ's failure to develop the record properly.

26 Third, the ALJ erred by not even discussing the lay witness testimony of Claimant, his
27 niece and the Social Security interviewer about Claimant's comprehension difficulties. Lay
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1 witness testimony regarding a claimant's symptoms "is competent evidence that an ALJ must
2 take account, unless he or she expressly determines to disregard such testimony and gives
3 reasons germane to each witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
4 2001). Lay witness testimony cannot be disregarded without comment. Stout v. Comm'r,
5 454 F.3d 1050, 1053 (9th Cir. 2006). The Commissioner dismisses the lay witness
6 observations because they are not medical or psychiatric evidence. The Commissioner's
7 attempt to dismiss the lay witness evidence must fail because the ALJ never discussed that
8 evidence in his decision. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). In any
9 event, the Commissioner's assertion, though true, is irrelevant, fails to appreciate the value
10 of lay witness evidence and confuses proof of mental impairment with the ALJ's duty to
11 develop the record. The lay witness evidence may not establish mental impairment but it
12 triggered the ALJ's duty to inquire further. The failure to do so was error.

13 Fourth, the lay witness testimony undermines the ALJ's RFC. Had the ALJ developed
14 the record further and obtained a mental assessment, the ALJ may have had to recognize
15 additional limitations in his RFC. The ALJ's failure to address the lay witness evidence in his
16 RFC was obvious error.

17 Fifth, the lay witness testimony undermines the ALJ's step five determination that
18 there are jobs in significant numbers in the national economy that Potts could perform. The
19 vocational expert identified three jobs: dryer attendant (DICOT 581.686.018), hand packager
20 (DICOT 920.587-018), and linen room attendant (DICOT 222.387-030.) The last of these
21 jobs has a reasoning level of 3 and the middle one a reasoning level of 2. If mental
22 limitations were added to Plaintiff's RFC, these jobs might be precluded. The dryer attendant
23 job has a reasoning level of 1 but only 1,691 local jobs. The Court takes no position on
24 whether Plaintiff is precluded from all work, but that determination cannot be made on this
25 record, which is not fully and fairly developed.

26 Sixth, the Commissioner suggests that Plaintiff's comprehension difficulties might be
27 the result of Plaintiff's hearing problem. (AR 128.) Again, the ALJ did not mention this
28 argument in his decision. The Commissioner's argument, moreover, is an admission of

1 ambiguous record evidence that would trigger the ALJ's duty to conduct an appropriate
2 inquiry. Tonapetyan, 242 F.3d at 1150.

3 The Commissioner makes a series of arguments in support of the affirmance of the
4 ALJ's decision but most of these arguments nowhere appear in the ALJ decision and cannot
5 be considered here. Connett, 340 F.3d at 874. Some of these arguments already have
6 been addressed. The others lack merit or are insufficient to establish harmless error.

7 The Commissioner, for example, observed that Plaintiff never attended special
8 education classes, he reads the newspaper, and the physician who performed the physical
9 examination did not mention that Potts had any comprehension difficulties. None of these
10 facts is any substitute for a mental assessment or excuses the ALJ's failure to develop the
11 record fully and fairly.

12 The most disturbing argument that the Commissioner advances is that Plaintiff cannot
13 demonstrate prejudice from the lack of representation because he did not present evidence
14 of a disabling mental impairment to the Appeals Council when he did retain counsel, and has
15 not presented any new evidence to this Court, citing Hall, 602 F.2d at 1377-78. The
16 Commissioner, however, reads Hall too broadly, which is also distinguishable. In Hall, the
17 claimant presented new evidence in the form of a psychiatric evaluation that did not establish
18 mental impairment and thus the Court held that no prejudice occurred from the lack of
19 representation. Here, of course, no new evidence has been presented yet because the ALJ
20 failed in his duty to develop the record. Hall does not stand for the general proposition that a
21 claimant is obliged to present new evidence proving disability to establish prejudice from lack
22 of representation. The Commissioner's assertion confuses Plaintiff's burden of proof with the
23 ALJ's independent special duty to develop the record and would inappropriately turn his duty
24 to develop the record back on Plaintiff. The legal standard is prejudice and unfairness in the
25 administrative hearing. That standard is more than met here by the ALJ's errors in not
26 developing the record in view of the lay witness evidence and in failing to discuss that
27 evidence in assessing Plaintiff's RFC, thereby undermining both the ALJ's RFC and his step
28 five determination of what jobs in the national economy Plaintiff could perform.

1 The ALJ decision is reversed and remanded for further proceedings with the
2 instruction that an appropriate consulting examiner (such as a psychologist) be retained to
3 conduct a mental assessment and determine whether Plaintiff's RFC should be modified to
4 incorporate mental limitations.

5 **ORDER**

6 IT IS HEREBY ORDERED that Decision of the Commissioner of Social Security is
7 reversed and remanded for further proceedings in accordance with law and with this
8 Memorandum and Order.

9 LET JUDGMENT BE ENTERED ACCORDINGLY.

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11 DATED: March 17, 2011

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE